IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

O R D E R

Farukh Mohammed. Versus Shenaj Bano & Anr.

S.B. Criminal Misc. Petition No. 902/2005
against the order dated 14-7-2005 passed
by the Addl. Chief Judicial Magistrate No.3,
Bikaner, in Cri. Misc. Case No.336/2003.

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Date of Order: August 01, 2006

PRESENT

HON'BLE MR. JUSTICE H.R. PANWAR

Mr. S.D. Vyas, for the petitioner.
Mr. Basti Chand Bhansali, for the non-petitioners.

BY THE COURT:

By the instant criminal miscellaneous petition under Section 482 of the Code of Criminal Procedure, 1973, the petitioner has assailed the order dated 14-7-2005 passed by the Additional Chief Judicial Magistrate No.3, Bikaner (for short, "the trial Court" hereinafter) in Criminal Miscellaneous Case No. 336/2003, whereby the trial Court granted maintenance @ Rs.1500/- per month in favour of non-petitioner No.1 and @ Rs.1000/- per month in favour of non-petitioner No.2, the minor son of the parties.

The marriage between the parties was solemnized on 17-4-1999 at Bikaner in accordance with Muslim customs and

rites. Out of that wed-lock, non-petitioner No.2 Sahil was born to non-petitioner No.1 from the loin of the petitioner. The non-petitioner No.1 came with the case that the petitioner used to cruelly treate the non-petitioner No.1 for demand of dowry and ultimately turned out her from the matrimonial house and left her at her parental house. The non-petitioner filed an application under Section 125 of the Code for grant of maintenance to her and her minor son stating therein that the petitioner, despite having sufficient income, failed to maintain them and neglected them. The petitioner came with the case that he had already given "Talaq" to the non-petitioner No.1 on 9-8-2002 by sending registered letter which the non-petitioner refused to accept and thereafter he sent letter through Crown Currier on 4-9-2002 and also sent a letter by post to the non-petitioner No.1 communicating that he has given Talaq to her. The non-petitioner No.1 categorically denied having received any such letter. The learned trial Court, placing reliance on the decision of the Hon'ble Supreme Court in Shamim Khan Vs. State of U.P. & Anr., 2004 (2) Cr.L.R. 932, and a decision of this Court in Gulam Mohammed Vs. Acchu, 2005 (1) Cri. Court Cases 250, allowed the application under Section 125 of the Code and awarded maintenance to the non-petitioners No.1 and 2, as noticed above.

I have carefully gone through the impugned order.

The provisions of Muslim Women (Protection of Rights on Divorce) Act, 1986 does not apply so far as granting maintenance to minor children is concerned, thus, the non-petitioner No.2 Sahil (minor son of the parties) is entitled for maintenance and the trial Court is justified in awarding maintenance to him. So far as non-petitioner No. 1 Shenaj Bano is concerned, she is entitled for maintenance on being established that she is unable to maintain herself as having no independent source of earning.

So far as alleged giving Talaq to non-petitioner No.1 by the petitioner is concerned, the non-petitioner No.1 has specifically denied this assertion of the petitioner. Whether valid Talaq was given or not, is a question to be considered by the Civil Court where according to the parties, a suit is pending between them and, therefore, it would not be appropriate to decide this question on an application under Section 125 of the Code and the trial Court has observed in para No.6 of the order that a separate suit is pending in this regard. More so, in Shamim Ara Vs. State of U.P. & Anr., 2003 Cr.L.R. (SC) 24, the Hon'ble Supreme Court held as under:-

> "We are also of the opinion that the talaq to be effective, has to be pronounced. The term 'pronounce' means to proclaim, to utter formally, to utter rhetorically, to declare, to utter, to articulate (see Chambers 20th Centuary Dictionary, New Edition, p. 1030). There is no proof of talaq having taken place on 11.7.1987. What the High Court has

> upheld as talaq is the plea taken in the written statement and its communication to the wife by delivering a copy of the written statement on 5.12.1990. We are very clear in our mind that a mere plea taken in the written statement of a divorce having been pronounced sometime in the past cannot by itself be treated as effectuating talaq on the date of delivery of the copy of the written statement to the wife. Respondent No.2 ought to have adduced evidence and proved the pronouncement of talaq on 11.7.1987 and if he failed in proving the plea raised in the written statement, the plea ought to have been treated as failed. We do not agree with the view propounded in the decided cases referred to by Mulla and Dr. Tahir Mahmood in their respective commentaries, wherein a mere plea of previous talaq taken in the written statement, though unsubstantiated, has been accepted as proof of talaq bring to an end the marital relationship with effect from the date of filing the written statement. A plea of previous divorce taken in the written statement cannot at all be treated as pronouncement of talaq by the husband on the wife on the date of filing of the written statement in the Court followed by delivery of a copy thereof to the wife. So also the affidavit dated 31.8.1988, filed in some previous judicial proceedings not inter parties, containing a self-serving statement of respondent No.2, could not have been read in evidence as relevant and of any value."

The Apex Court also noticed the law propounded on the point of Talak by a Muslim husband to a Muslim wife and taken note of the decisions of various High Courts in para 13 of the report which reads as under:-

> "There is yet another illuminating and weighty judicial opinion available in two decisions of the Gauhati High Court recorded by Baharul Islam, J. (later a Judge of the Supreme Court of India) sitting singly in Jiauddin Ahmed V. Anwara Begam (1981) 1 Gau. LR 358 and later speaking for the Division Bench in Rukia Khatun V. Abdul Khalique Laskar

(1981) 1 Gau. LR 375. In Jiauddin Ahmed case (supra) a plea of previous divorce i.e. the husband having divorced the wife on some day much previous to the date of filing of the written statement in the Court was taken and upheld. The question posed before the High Court was whether there has been valid talaq of the wife by the husband under the Muslim Law. The learned Judge observed that though marriage under the Muslim Law is only a civil contract yet the rights and responsibilities consequent upon it are of such importance to the welfare of humanity, that a high degree of sanctity is attached to it. But in spite of the sacredness of the character of the marriage tie, Islam recognises the necessity,in exceptional circumstances, of keeping the way open for its dissolution (para 6). Quoting in the judgment several Holy Quranic verses and from commentaries thereon by well-recognised scholars of great eminence, the learned Judge expressed disapproval of the statement that 'the whimsical and capricious divorce by the husband is good in law, though bad in theology' and observed that such a statement is based on the concept that women were chattel belonging to men which the Holy Quran does not brook. The correct law of talaq as ordained by the Holy Quran is that talaq must be for a reasonable cause and be preceded by attempts at reconciliation between the husband and the wife by two arbiters- one from the wife's family and the other from the husband's; if the attempts fail, talaq may be effected (para 13). In Rukia Khatun case (supra) the Division Bench stated that the correct law of talaq, as ordained by the Holy Quran, is: (i) that "talaq" must be for a reasonable cause; and (ii) that it must be preceded by an attempt of reconciliation between the husband and the wife by two arbiters, one chosen by the wife from her family and the other by the husband from his. If their attempts fail,"talaq" may be effected. The Division Bench expressly recorded its dissent from the Calcutta and Bombay views which, in their opinion, did not lay down the correct law."

In the above case, the Hon'ble Supreme Court was in agreement with the observations made, quoted here-in-above.

In this view of the matter, I do not find any error, illegality or perversity in the order impugned, which may warrant interference in exercise of inherent jurisdiction of this Court under Section 482 of the Code.

Consequently, the criminal miscellaneous petition lacks merit and it is dismissed accordingly. The stay petition also stands dismissed.

(H.R. PANWAR), J.

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